

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1388

To be argued by
Howard L. Jacobs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

-against- :

JUL ORTEGA-ALVAREZ, CIRO RODRIGUEZ- :
LANA, JORGE INFIESTA, CHARLES :
SISO-CIFRE, DOMINGO DEL CRISTO, :
MANDO GARCIA-ALVAREZ, CIRILLO :
GUEROA, :

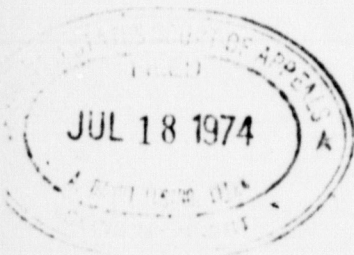
Appellants. :

Docket No. 74-1388

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BRIEF FOR APPELLANT INFIESTA

Appeal From A Judgment Of Conviction
Rendered In The United States District
Court For The Southern District Of New
York.



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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by Jorge Infiesta from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles M. Metzner) rendered April 22, 1974, after a four week jury trial, convicting appellant of the purchase and receipt of heroin and conspiracy so to do in violation of Title 21, United States Code, Sections 173 and 174.

Appellant Infiesta was sentenced to eight (8) years imprisonment on Counts One and Three, the sentences on each count to run concurrently with each other.

STATEMENT OF FACTS

The Proceedings Below

Appellant Infiesta was indicted in two counts of a seventeen count indictment with the other seven appellants and fourteen other defendants. Six (6) defendants, Luis Reyes-Padron, Jose Luis Sarria, John Doe a/k/a "Roberto", Francisco Orlando Perez, Jose Ramirez-Ramos and John Doe a/k/a Roberto Lopez, were not apprehended prior to trial. On January 22, 1974, Judge Metzner dismissed Count 1 as to defendant Carlos Tapanes. That was the only count in which he was named. On February 19, 1974, defendant Orlando Gil waived indictment and pleaded guilty to selling narcotics not

in or from a stamped package (74 Cr.180). On February 20, 1974, Judge Metzner dismissed County One against defendant Joaquin R. Prada and severed Prada from the trial as to his remaining count, Count 12.

On February 20, 1974, the trial commenced as to the remaining thirteen defendants on twelve counts, eleven substantive counts and Count One, the conspiracy. At the conclusion of the Government's case Judge Metzner dismissed both counts naming defendant Rigoberto Rosal-Rodriguez, and Count Nine against defendant Hugo Viera. On March 20th the jury rendered its verdict. The jury found defendants Francisca Rodriguez Calana, Hugo Viera, Jose Aquilera and Hector Echeverria not guilty on all counts in which they were named. They also found the following defendants guilty on the counts set forth.

<u>Defendant</u>	<u>Counts</u>
Raul Ortega	1, 2 and 3
Charles Busigo-Cifre	1 (Not Guilty on Count 5)
Armando Alvarez	1 and 8
Jose Otero	1 and 14
Cirillo Figueroa	1 and 11
Jorge Infiesta	1 and 3
Domingo Del Cristo	1 and 6
Ciro Rodriguez-Calana	1 and 2

Appellant Infiesta is presently incarcerated in the United States Penitentiary, Lewisburg, Pennsylvania having failed to post bail.

The Government's Case

A. Introduction: Nature of Conspiracy and Roles of Conspirators.

This case involves the sale and distribution of 45 kilos of heroin in the New York metropolitan area. The sellers and distributors were appellant Raul Ortega-Alvarez and the two principal government witnesses, Miguel Rodriguez and Ramiro Gonzalez Infante. The remaining seven appellants and the other fourteen defendants were all customers of Ortega, Rodriguez and Gonzalez, except for appellant Ciro Rodriguez-Calana and his wife, acquitted defendant Francisca Rodriguez Calana, relatives of Ortega, who kept the heroin in their house. The distribution took place in March, April and May, 1970, in New York, New Jersey and on Long Island.

As is usual in such cases, the Government's case against appellants and the acquitted defendants rose and fell upon the credibility of Rodriguez and Gonzalez. As to many incidents their testimony was in direct conflict, creating for the jury a dilemma as to which version to choose as to the defendants involved in the incidents. These conflicts have a bearing on the decision of this appeal and will be discussed later in greater detail.

B. Ortega Receives 45 Kilos of Heroin.

In January, 1970, Roberto Arenas agreed to take 60 kilos of heroin from Hosep Caramian. On February 2, 1970, Manuel Noa came to New York from Miami and at Arenas'

request went to the airport with Caramian to pick up the heroin. At the airport Caramian gave Noa three gray suitcases containing the sixty (60) kilos of heroin which Noa stashed in an apartment in New York. Noa sold five (5) kilos of the heroin during the next two or three weeks. Because he thought he was being followed, he gave the rest of the heroin to Arenas, by dropping it off at an apartment on Audubon Avenue between 187th and 188th Streets in New York (692-702, 736-740). *

Segundo Coronel informed Arenas that appellant Ortega would take the remaining 55 kilos. Arenas delivered the heroin to Ortega on about February 15 or 16, 1970, and was told by Ortega that he was going to take the heroin to his brother-in-law's apartment. Later, Caramian asked for return of 20 kilos of the heroin from Ortega. At Arenas' apartment Caramian reduced this request to 10 kilos, which Ortega gave to him, leaving Ortega with 45 kilos. Ortega left by car with his brother-in-law, appellant Calana (741-747).

C. Ortega Gets Gonzalez And Rodriguez To Help Sell The Heroin.

On March 10 or 11 in Miami, Ortega told Gonzalez he had 45 kilos of heroin in New York and asked him to help sell it and share the profits 50-50. Gonzalez agreed. With

* Refers to pages of the Trial Transcript.

\$300.00 given to him by Ortega, Gonzalez purchased a sealing machine, plastic bags and airline tickets for them to Newark Airport. Enroute to Newark, Ortega told Gonzalez he had already sold 3 kilos to appellant Infiesta, and Luis Reyes. Upon arrival they stayed at the Saxony Motel in New Jersey (819-823).

The next day at the Calana's apartment in Elizabeth, New Jersey, Ortega showed Gonzalez two suitcases of heroin and told Gonzalez there was a third suitcase at another apartment. Ortega and Gonzalez then went to Infiesta's apartment in New York, where Infiesta asked Gonzalez if he could get Ortega to give him a better price and better quality heroin. Gonzalez said he would try (824-828, 1553-1555).

Gonzalez then went to Rodriguez's home in Westbury, Long Island, where he told Rodriguez about the heroin and asked for his aid in selling it. Rodriguez said he knew an Italian who wanted heroin and would get in touch with him. Rodriguez talked to the Italian, Mike Sifori, and arranged to sell 1 kilo to some Italian friends of Sifori (Federal Narcotic Agents). (85-88, 828-831).

The same day, Ortega, Rodriguez and Gonzalez discussed their financial arrangements. Ortega had told Gonzalez on the plane that he was paying \$14,500.00 per kilo

for the heroin, and was giving Calana \$1000.00 per kilo to stash it. He told Gonzalez and Rodriguez not to sell the heroin for less than \$18,000.00 per kilo. He and Gonzalez were to split the \$2,500.00 profit between \$15,500.00 and \$18,000.00 and Gonzalez and Rodriguez could share anything they got over \$18,000.00 per kilo. This was besides the profit on any mixtures they took out in cutting the heroin. Ortega told them some of the heroin was white, some gray. The gray heroin could be cut (diluted) fourteen times, the white, ten to twelve times. Ortega O.K.'d the sale to Sifori (117-118, 831-834).

D. Rodriguez and Gonzalez Sell Heroin To Agents.

Much to the later unhappiness of Rodriguez and Gonzalez, their first customer was an undercover agent of the Drug Enforcement Administration, Thomas J. Angioletti, on March 13th. Rodriguez and severed defendant, Joaquin R. Prada, were introduced by Sifori to Angioletti and his partner, Agent Frank Tumillo. After some discussion of cocaine, Angioletti agreed to purchase one kilo of heroin for \$25,000.00, but wanted a sample first. Rodriguez tried to get the sample from Ortega, who said he was trying to get it from Infiesta. Prada ended up delivering a sample of his own heroin to Angioletti from a steam pipe at his gas station at 165th Street and Amsterdam Avenue (89-101, 1369-1387).

Gonzalez, according to his testimony, went to Calana's apartment and picked up two and one-half (2½) kilos of heroin which he brought to Rodriguez at Infiesta's apartment. According to Rodriguez, he, Gonzalez, Infiesta and Infiesta's wife, waited at Infiesta's place while Ortega got the heroin which he left on the seat of his sister's car. In any event, Rodriguez and Gonzalez went to Prada's gas station to deliver one kilo of heroin to Angioletti (101-103, 834-837).

At the station Gonzalez waited outside, while Rodriguez delivered the heroin to Angioletti who gave him \$25,000.00. Rodriguez gave the money to Gonzalez and they drove back to Infiesta's apartment where Gonzalez gave Ortega \$18,000.00. Rodriguez and Gonzalez each kept \$3,000.00 and the other \$1,000.00 Rodriguez gave to Sifori (103-107, 128-131, 844-849, 1388-1392, 1395-1399, 1484-1487, 1524-1527).

On March 16, Rodriguez, Gonzalez, Angioletti and Tumillo met at Luigi's Restaurant on 178th Street and Broadway, where they discussed the first purchase and future sales. Ortega was at the bar of the restaurant, having come with Gonzalez. On March 19 Angioletti and Tumillo met with Rodriguez and Gonzalez and agreed to buy a second kilo for \$24,000.00. On March 31 the second kilo was delivered by

Carlos Tapanes at a diner in Hicksville, Long Island.

Angioletti paid Rodriguez \$24,000.00. Rodriguez gave Tapanes \$500.00 for the delivery, Gonzalez refused to give his \$500.00 share. There were several later discussions about a ten kilo purchase, but nothing came of them (131-147, 202-203, 849-851, 1399-1423, 1487-1490, 1605-1613).

E. Mixing and Packing of Heroin.

Gonzalez testified on the morning of March 13th he delivered 7 kilos of heroin to Infiesta's apartment. Present at the apartment with Gonzalez were Infiesta, Ortega, Rodriguez and Reyes. The 7 kilos were diluted with milk sugar to make 8 kilos and 9 ounces. Ortega took seven kilos for Arenas; Infiesta and Reyes took 1 kilo and Gonzalez took the other 9 ounces back to New Jersey (61A-63A). **

This is Gonzalez' version of the incident, Rodriguez' version differs somewhat. He testified that he, Gonzalez, Calana and Ortega went to Infiesta's apartment where Ortega asked Infiesta for heroin he had stashed there. Ortega and Infiesta then mixed four kilos into five and put it in kilo and half-kilo packages. Reyes and Figueroa then arrived. Ortega gave 1½ kilos to Infiesta and Reyes, took 3 kilos himself and asked Infiesta to "stash" ½ kilo. Infiesta said he would keep it in a car downstairs to keep the apartment "clean". He, Ortega, Gonzalez and Calana then

**Refers to joint Appendix of appellants Infiesta and Del Cristo.

went to 110th Street and Broadway, where Ortega delivered the 3 kilos to Juan Chaveco. Ortega said he'd made two deliveries each to Chaveco and Reyes and that Rodriguez and Gonzales should get active and sell the rest of the heroin (42A-46A).

The heroin was also mixed and cut at the Calana apartment in Elizabeth. Once appellant Calana helped mix, and also went from New York to New Jersey to get heroin. The acquitted defendant, Mrs. Calana, was present when heroin was mixed (115-117, 857-861).

F. Rodriguez and Gonzalez Sell Heroin To Figueroa.

Rodriguez and Gonzalez started looking for customers other than the agents and spread word of their shipment of heroin. Two or three days after the sale to Angioletti, Rodriguez, Gonzalez and Ortega went to the Calana house where Rodriguez told Ortega he needed $1\frac{1}{2}$ kilos for appellant, Cirillo Figueroa, and Prada. Ortega took the heroin from a suitcase, diluted it with milk sugar, and gave it to Rodriguez (107-115).

Figueroa told Rodriguez and Gonzalez he had been buying heroin from Infiesta and Reyes and wanted to buy from them. They agreed to sell it directly to him for \$19,000.00 a kilo. They delivered a total of $5\frac{1}{2}$ kilos of heroin to Figueroa in March and April, 1970. Once Rodriguez delivered

one kilo to a man who Figueroa introduced him to and lived on 175th Street and Broadway; another kilo was delivered by Rodriguez at Figueroa's direction to dismissed defendant, Rosal-Rodriguez; and once at Figueroa's instructions, Gonzalez delivered a kilo to Luis Despaines at acquitted defendant Viera's apartment. Figueroa paid Gonzalez for this heroin at the 005 Bar. Figueroa wanted more heroin, but they had no more (212-225, 923-926, 942-946).

G. Rodriguez and Gonzalez Sell Heroin to Alvarez.

Rodriguez and Gonzalez were introduced to Alvarez by Viera. They agreed to sell Alvarez a kilo of heroin for \$20,000.00. Rodriguez delivered the heroin to Alvarez, who paid Gonzalez. Later, Gonzalez delivered in two deliveries a total of 3 kilos to Alvarez at Viera's apartment. Alvarez ordered another kilo from Gonzalez in Miami, Rodriguez was supposed to deliver it to Viera in New York, but testified he never delivered any heroin to Viera. Finally, Gonzalez and Rodriguez delivered 1 kilo or 1½ kilos to Alvarez on 158th Street and Broadway, in New York. Part payment for the last delivery was made with 9 ounces of cocaine (230-238, 899-905, 908-922).

H. Rodriguez Sells Heroin to Orlando Gil and Paco Perez Who Resell it to an Agent.

Once again Rodriguez sold heroin to the wrong men. On March 13, 1970, defendants Paco Perez and Orlando Gil sold ½ kilo of heroin to Agent Frederick W. Ford for

\$11,500.00. Rodriguez sold 1/4 kilo to Perez and Gil in the latter part of March. Gil thought Rodriguez supplied the heroin they sold to Ford (238-242, 643-650, 658, 668-677, 681-686).

I. Rodriguez and Gonzalez Sell Heroin to Cifre and Echeverria.

It is unclear from the testimony whether there was one or two half-kilo sales to appellant Charles Busigo-Cifre. Gonzalez testified to two sales, one on March 13 about an hour after the sale to Angeoletti and the second several days later with Rodriguez making the delivery. Both deliveries were to a man designated by Cifre. Cifre paid for the heroin (884-891).

Rodriguez only testified about a sale approximately six days after the sale to Angeoletti. He said Cifre came to him and said he had purchased heroin from Prada and had difficulty and wanted to buy directly from him and Gonzalez. They agreed to sell him $\frac{1}{2}$ kilo for \$9,500.00. He delivered the heroin to Cifre's man and received payment from Cifre through Prada (155-161).

Both Gonzalez and Rodriguez testified about one sale to acquitted defendant, Hector Echevarria. Gonzalez said it was on March 13, after the sales to Angeoletti, Cifre and appellant Del Cristo. Rodriguez said it was three to five days after the sale to Angeoletti. Echeverria told

Rodriguez he wanted $\frac{1}{2}$ kilo. Rodriguez agreed to sell it to him for \$10,500.00. Rodriguez got the heroin from Ortega and went with Gonzalez to Echeverria's supermarket and delivered the heroin to Echeverria. They had a great deal of difficulty collecting from Echeverria. Cifre guaranteed \$2,000.00 of the debt, and Rodriguez got \$3,000.00 from Echeverria to bail Tapanes out of jail in July, 1970 (206-212, 874-883).

J. Rodriguez and Gonzalez Sell Heroin to Reyes and Infiesta.

In addition to Ortega telling Gonzalez he had sold 3 kilos to Reyes and Infiesta (See p. 5 supra) and Reyes and Infiesta receiving 1 or $1\frac{1}{2}$ kilos in Infiesta's apartment (See p. 8 supra) Gonzalez testified he and Ortega delivered 1 kilo to Reyes and a few days later he and Ortega delivered 2 kilos to Reyes and Infiesta at Infiesta's apartment (871-874). Gonzalez collected money from Reyes and Infiesta.

K. Rodriguez and Gonzalez Sell Heroin to Del Cristo.

The testimony of Rodriguez and Gonzalez as to deliveries of heroin to Del Cristo show startling conflicts. Gonzalez testified there were two deliveries by Rodriguez to Del Cristo. Rodriguez did not ever sell or deliver any heroin to Del Cristo. Rodriguez testified Del Cristo was looking for Ortega to buy heroin. Rodriguez informed Ortega who said he'd talk to Del Cristo. Rodriguez did recall receiving money from Del Cristo and that it was "short, or something" and taking the money to Gonzalez' aunt's house.

Once, Roberto Lopez, to whom Rodriguez had delivered heroin, told Rodriguez he had sold heroin which had been delivered to Del Cristo. Finally, Rodriguez said he had seen Del Cristo and Lopez together (47A-55A).

Gonzalez testified that he saw Rodriguez deliver $\frac{1}{2}$ kilo of heroin to Del Cristo in the parking lot of Prada's gas station within one hour after the sale to Angeoletti on March 13. None of the agents surveilling the station saw the delivery and Rodriguez had no recollection of it. Thereafter, Gonzalez, Rodriguez, Ortega, Del Cristo and Lopez met in the Gallo de Maron Bar. Del Cristo was attempting to purchase another $\frac{1}{2}$ kilo. According to Gonzalez, Ortega told Rodriguez, Del Cristo was a friend of his, had paid his share and authorized Rodriguez to deliver a second $\frac{1}{2}$ kilo to Del Cristo. According to Gonzalez, both Rodriguez and Ortega told him Rodriguez delivered a second $\frac{1}{2}$ kilo to Del Cristo. Rodriguez did not recall any deliveries to Del Cristo (64A-70A) (1484-1485, 1497-1498, 1524-1542).

L. Sales of Heroin to Others.

In addition to the sales of heroin already detailed the balance of the 45 kilos was sold by Ortega, Gonzalez, and Rodriguez to Juan Chaveco, convicted defendant Jose Otero, acquitted defendant Jose Angel Aguilera, Prada, Jose Luis Sarria, Roberto Lopez and Jose Ramirez-Ramos (242-247, 254-272, 946-950, 953-962, 969-971).

M. Handling of Money from Heroin Sales.

Rodriguez turned over the money he collected to Ortega. Gonzalez gave the money he collected to Ortega or Mr. or Mrs. Calana. Gonzalez went with Ortega to the building where Arenas lived. He waited downstairs while Ortega brought money up to Arenas. Ortega would bring \$20,000.00 - \$30,000.00 to Arenas at a time. Arenas received \$140,000.00 from Ortega which he gave to Caramian (118, 748-749, 861-863, 866-867).

N. Hotels, Cars, Bars, Telephone Calls, etc.

When in New York, Gonzalez, Ortega and Reyes stayed at the Paramount Hotel. Many of the deliveries of heroin and payments for the heroin were made at Prada's gas station which had previously been owned by Cifre, the 005 Bar, Gallo de Maron Bar, Cuba Bar and Blue Mirror Bar which photos and surveillance showed were frequented by Gonzalez, Figueroa, Infiesta, Rodriguez, Jose Ramirez-Ramos, Viera, Tapanes, Cifre, Del Cristo and Ortega (121, 184-193, 279-285, 296-302, 618-625, 633-638, 789-795, 1613-1618).

Ortega, Gonzalez and Rodriguez used cars belonging to Ortega and the Calanas on several occasions (625-633, 1575-1602). Also observed, was a car rented by Reyes and signed for by Infiesta (1602-1605). Telephone slips showed that during April and May, 1970, there were calls from Reyes in Florida to Infiesta in New York (Gov. Ex. 22, 1556-1568).

O. End of Conspiracy.

Rodriguez continued to collect money for the heroin they had sold until August or September, 1970. The last payment was from Echeverria. Rodriguez participated in the sale of approximately 20 kilos. At the final accounting among Rodriguez, Gonzalez and Ortega there was an argument about the disappearance of the 9 ounces taken out of each kilo when they mixed and cut the heroin. Ortega and Gonzalez accused Rodriguez of taking that heroin (274-277).

P. Exculpatory Statements.

1. Ortega - When arrested on April 1, 1971, Ortega told Government Officials he hadn't been in New York or New Jersey for two years (1481-1482).

2. Del Cristo - After being arrested, Del Cristo when interviewed about a conspiracy to sell heroin in March and April, 1970, said it couldn't have happened since he was in the hospital and had the scars to prove it. While admitting he knew Echeverria, Rodriguez and Gonzalez, he said he didn't recall Ortega (1710-1724).

Q. The Defense.

Acquitted defendant, Francisca Ortega-Rodriguez (Mrs. Calana), established through her employment records, as well as the testimony of an official of her employer, Marva Industries, a fellow employee and her own testimony, that in February, March and April she worked six days a

week (Monday through Saturday) from before 7 A.M. until 5 P.M. and could not leave the factory during those hours. Mrs. Calana denied knowing Rodriguez, Gonzalez or Arenas, and specifically denied their accusations as to her participation in the conspiracy. She also testified her children were home in the mornings during the week and returned home from school about 4 P.M. She also testified that her sister did not come to the United States from Cuba until 1971 (1861-1879, 1883).

In rebuttal the Government showed that Mrs. Calana's sister lived in Elizabeth, New Jersey, in 1970 and that Mrs. Calana's son left school in Elizabeth on March 16, 1970 (1993-2000).

Appellant Calana introduced records to show he was employed from January to June, 1970, but could not produce the records to show the days and hours of his employment due to the unavailability of the records because of the firm's bankruptcy (1853-1861).

Appellant Cifre called his brother as a witness to testify Cifre was in Puerto Rico from the middle of June, 1970, until the beginning of August, 1970, during which time he was supposed to be paying money to Gonzalez in New York (1922-1932).

Acquitted defendant Echeverria established that Rodriguez, not Echeverria, gave the \$3,000.00 to the

bondsman for Tapanes' bail (1898-1905). He also offered the testimony of three prisoners, who testified that on various occasions Rodriguez and Gonzalez attempted to induce them to cooperate with the Government, even if it meant giving false testimony. Two of them testified that Rodriguez and Gonzalez admitted giving false testimony (1939-1945, 1949-1950, 1966-1970). In rebuttal the Government called the attorney of one of the prisoners who was present during one of these conversations in Spanish. In his later discussion of the conversation he had no recollection that his client said Rodriguez asked him to testify falsely (1988-1992A).

POINT ONE

APPELLANT INFUESTA
WAS NOT ADEQUATELY
REPRESENTED BY COUNSEL

A. Infiesta's Defense Was A Sham

Counsel was assigned to represent appellant Infiesta on October 31, 1973 and met with him only twice prior to the commencement of trial on February 20, 1974. On February 15, 1974, Infiesta wrote to Judge Metzner requesting new counsel on the grounds the assigned counsel met him only twice and did not believe in his innocence. On February 20th Judge Metzner denied the application and the trial commenced the same day (39A-41A).

The case against Infiesta rested solely on the testimony of Rodriguez and Gonzalez. If their testimony relating to Infiesta could have been discredited, as it was for other defendants, Infiesta might have been acquitted. From the verdicts it is clear the jury did not totally accept or reject the testimony of these two witnesses. The jury was selective, as to some defendants their testimony was accepted, as to others there was sufficient doubt in the testimony to mandate a not guilty verdict. Surely, if Gonzalez and Rodriguez' testimony had not been thoroughly sifted on cross-examination by counsel for Viera, Echeverria, Mrs. Calana and Aguilera, they would not have been acquitted. Infiesta was entitled to the same representation. The question is, whether assigned counsel for Infiesta, with all of the material available to him to discredit the testimony of Rodriguez and Gonzalez, adequately performed this task. It is difficult to criticize the representation of a fellow attorney, and it is especially hard for this Court to evaluate that representation from the cold record before it. But, the courts have the duty to assist in the improvement of the quality of representation in criminal cases. One way of doing this is to see to it that representation by counsel is always adequate. Especially, where counsel is assigned by the Court, and continued by the Court over the defendant's objection, this Court must closely scrutinize the adequacy

of the representation. See comments of Chief Justice Warren E. Burger at Fordham Law School at the John F. Sonnett Lecture, N.Y. Law Journal, November 27, 1973, p.1, col.3; and Chief Judge Irving R. Kaufman at Annual Dinner of N.Y. County Lawyers Ass'n., N.Y. Law Journal, December 7, 1973, p.5, col.1-6. The right to counsel means the right to competent counsel. McMann v. Richardson, 397 U.S. 759, 771 (1970); United States ex rel Thomas v. Zelker, 332 F. Supp. 595, 599 (S.D.N.Y. 1971), not merely perfunctory representation, United States v. Wright 176 F. 2d 376, 378 (2d Cir. 1949). This Court has construed this to mean that inadequate representation is of such a kind as to shock the conscience of the Court so as to make the proceedings a farce and mockery of justice. United States v. Matalon, 445 F. 2d 1215, 1218 (2d Cir. 1971).

"conduct of counsel amounts to a constitutional denial of representation entitling a defendant to release only where it has been proved to be 'of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice'" [Citations omitted]. United States ex. rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973).

Bearing these stringent criteria in mind, we can now determine whether Infiesta was afforded adequate representation. The most damaging testimony offered against Infiesta was the "mixing party" at his apartment.

Both Rodriguez and Gonzalez testified they were present at the mixing and cutting of heroin at Infiesta's, but each had his own version. Gonzalez testified he brought seven kilos of heroin to Infiesta's. Rodriguez testifies Infiesta produced four kilos of heroin from somewhere in the apartment at Ortega's request. Rodriguez testified that he, Infiesta, Gonzalez, Ortega, Reyes and Figueroa were present. Gonzalez testified as to all of the above, except Figueroa, leaving him out. Gonzalez testified Ortega took seven kilos for Arenas, gave one kilo to Infiesta and Reyes and he, Gonzalez, took nine ounces back to New Jersey. Rodriguez testified Ortega took three kilos which he delivered to Juan Chaveco, gave $1\frac{1}{2}$ kilos to Infiesta and Reyes and gave the remaining $\frac{1}{2}$ kilo to Infiesta to "stash".

It should not take Clarence Darrow to realize that there are important discrepancies between the versions of Rodriguez and Gonzalez which should be further developed on cross-examination and finally discussed in detail in arguing to the jury during summation.

Infiesta's counsel did not cross-examine Rodriguez at all about the "mixing party" (56A-60A). In cross-examining Gonzalez, Infiesta's counsel already armed with Rodriguez' contradictory testimony used none of it. Never once highlighting the discrepancies between Rodriguez and Gonzalez, he merely touched upon small portions of the direct

examination regarding the mixing (71A-74A). Finally, counsel's summation fails to point out any of the discrepancies to the jury, but speaks in general terms which failed to assist the jury in assessing the credibility of Rodriguez and Gonzalez regarding their testimony against Infiesta (75A-84A).

All other counsel at trial, representing defendants against whom Rodriguez and Gonzalez testified, hammered away on cross-examination and summation at any and all discrepancies between the two which affected their clients. Some were successful, others not. Infiesta was not given the chance of success because his counsel failed to use this most rudimentary tool at any time during the trial.

What, if anything, did counsel do for Infiesta to discredit the testimony of these witnesses and present a reasonable and arguable defense to the jury? I submit a search of his cross-examination and summation, brief as it is, will show this Court that he sadly let his client down.

Although Infiesta has the burden of showing that his trial counsel's representation was inadequate, that burden is less here because this is a direct appeal, rather than a collateral attack on the judgment. United States v. Hammonds, 425 F.2d 597, 600 (D.C. Cir. 1970); Bruce v. United States, 379 F.2d 113, 117 (D.C. Cir. 1967).

As this Court recognized in United States v. Massimo, 432 F. 2d 324 (2d Cir. 1970), cert. denied, 400 U.S. 1022 (1971), failure of trial counsel to enforce fundamental rights of a defendant might result in reversal of the conviction unless the record indicates that the failure was probably part of counsel's trial tactics, whether wise or not.

Clearly here, counsel had to discredit Rodriguez and Gonzalez in order to properly defend Infiesta. It was not a question of trial tactics, for how else could Infiesta be defended. Not only did trial counsel not attempt to discredit them, he actually told the jury in summation, that Rodriguez was a truthful witness.

" What do we say? We say it is a belief. We believe Rodriguez even though Rodriguez is a convicted felon. We say that there was no happening in Infiesta's apartment whatsoever." (81A).

This was counsel's comment about the testimony of Rodriguez that he was in Infiesta's apartment when Infiesta produced 4 kilos of heroin at Ortega's request, helped mix it and received 1 kilo of the mixed heroin from Ortega. After hearing this argument from Infiesta's counsel that he believed Rodriguez, how could the jury do anything but convict Infiesta. Government counsel seized on this statement in her summation (2279-2284).

As Chief Judge Kaufman said in his dissent in United States ex. rel. Marcelin v. Mancusi, 462 F. 2d 36

(2d Cir. 1972):

"As with any area of procedural due process we cannot tolerate the debasement of the judicial process by preoccupation with a correct result regardless of the violence done to a litigant's fundamental rights."

Can the courts assign an attorney to an indigent defendant and then turn their backs upon the quality of representation given the defendant? Two consultations in over three and one-half months prior to trial? A motion by the defendant for new counsel five days prior to trial? Little or no meaningful cross-examination of the two key Government witnesses and a summation praising the truthfulness of one of these witnesses? Can we honestly say Jorge Infiesta received adequate representation? If there was little or nothing counsel could have done for the defendant because of the Government's case, reversal would not be appropriate. United States ex. rel. Testamark v. Vincent, Docket #73-2614 (2d Cir., May 8, 1974); United States ex. rel. Crispin v. Mancusi, 448 F. 2d 233 (2d Cir. 1971); United States v. Katz, 425 F. 2d 928 (2d Cir. 1970). But, here we had a case which could have gone either way. Let us not forget that four defendants in not a very dissimilar position than Infiesta were acquitted. Admittedly, eight others were convicted including Infiesta. In light of his inadequate representation Infiesta was denied the possibility

of acquittal.

Aside from the "mixing party", the testimony by Gonzalez was that Ortega told him he had delivered three ounces of heroin to Infiesta and Reyes; Infiesta asked him to try to get better quality and a better price from Ortega; and the collection of money by Gonzalez from Infiesta and Reyes. Rodriguez, clearly the better and more believable of the witnesses, was not present during these incidents and, therefore, could not corroborate Gonzalez as to them. Again, Infiesta's counsel made no attempt to discredit this testimony. He merely ignored it, possibly hoping it would go away.

Even under the strict rule of this Court such representation should not be approved, for it was woefully inadequate. Saltys v. Adams, 465 F. 2d 1023 (2d Cir. 1972); See also, Johns v. Perini, 462 F.2d 1308 (6th Cir.), cert. denied, 409 U.S. 1049 (1972); Owsley v. Peyton, 368 F. 2d 1002 (4th Cir. 1966).

B. This Court Should Adopt A Less Stringent Test For Adequacy Of Representation.

At least four circuits have now rejected the so-called "sham" test in determining the adequacy of representation, and have adopted as the test whether the defendant received reasonably competent representation. United States v. De Coster, 487 F.2d 1197, 1202 (D.C. Cir. 1973);

Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc); Coles v. Peyton, 389 F. 2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968); United States v. Hayes, 444 F.2d 472 (5th Cir.), cert. denied 404 U.S. 882 (1971); See, The Right To Counsel and the Neophyte Attorney, 24 Rutgers L. Rev. 379-387 (1970).

Surely, if the representation of Infiesta was not a sham, it was not reasonably competent representation.

"Viewing the record as a whole, we are compelled to the conclusion that trial counsel failed to meet the minimum requirements for effective assistance of his client. We do not find that any one of the specified actions or omissions in the conduct of the trial would in itself constitute ineffective assistance of counsel. Many of them might well be justified as proper trial tactics. But, the totality of the omissions and errors, and particularly the futile closing argument, clearly reflect a pro forma defense and a lack of adequate representation in the preparation and trial of the case." United States v. Hammonds, 425 F.2d 597, 604 (D.C. Cir. 1970). See also, Matthews v. United States, 449 F.2d 985, 992 (D.C. Cir. 1971) (Petition For Rehearing).

Infiesta received little more than pro forma or perfunctory representation. He was entitled to expect and receive more. He was entitled to receive reasonably competent representation. United States v. Beasley, 479 F.2d 1124 (5th Cir. 1973).

In United States ex. rel. Testamark v. Vincent, supra, this Court discussed the so-called liberal rule,

citing Bruce v. United States, supra. It is time this Court adopted this rule and implemented it by encouraging the selection of criminal counsel for indigents from attorneys who have proven to the Court that they can give the defendant "reasonably competent representation". By telling the District Court and the United States Magistrates that only "competent" counsel can be assigned, this Court will do much to uplift the quality of criminal representation in this Circuit.

POINT TWO

APPELLANT INFUESTA ADOPTS
THE ARGUMENTS OF ALL
OTHER APPELLANTS WHERE
APPLICABLE TO HIM

CONCLUSION

FOR THE ABOVE STATED REASONS THE
JUDGMENT SHOULD BE REVERSED AND
A NEW TRIAL GRANTED TO APPELLANT
INFUESTA.

Respectfully submitted,

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July 25, 1974.